No. 12,808

United States Court of Appeals
For the Ninth Circuit

BANKERS LIFE COMPANY (a corporation),

Appellant,

vs.

RUTH JACOBY,

Appellee.

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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BASIS OF JURISDICTION OF THIS ACTION IN THE DISTRICT COURT AND JURISDICTION OF THE UNITED STATES COURT OF APPEALS TO REVIEW THE SAME.

Appellee believes that the statement as to the jurisdiction of the United States Courts in this matter has been properly set forth in appellant's opening brief, and its statement in that regard is therefore adopted herein.

A CONCISE ABSTRACT OR STATEMENT OF THE CASE.

a. The question involved.

With certain additions, appellant's statement of the question involved in this appeal is believed correct and adequate. To point out the necessary additions for a proper understanding of the issue, appellee herewith copies appellant's statement of the issue, inserting the required additions in italics:

> "Where a life insurance policy provides it may be surrendered at any time for its cash surrender value, and the *right, title and interest of both the assured and the beneficiary in the* policy has been assigned to a person by a court-appointed agent of the insured and the named beneficiary, but said assignment has not changed the beneficiary, and said policy is neither lost, destroyed nor stolen but was last known to be in the possession of the insured *who absconded and* whose whereabouts are unknown, and there is no evidence that the insured *if found* cannot surrender the policy, can the assignee obtain the cash surrender value of the policy without the physical surrender of the policy to the insurer?

b. The manner in which the question is raised.

Appellee also wishes to adopt appellant's narration as to the manner in which the question is raised except as herein corrected. On page 4 of Appellant's Opening Brief the following statement is made:

> "The Judgment also ordered Lionel A. Jacoby and Betty Jacoby to apply to the payment of the Judgment the cash value of Bankers Life Policy No. 822714. That was the wrong policy. The correct one is No. 882714. On January 12,

> 1949, the said United States District Court in Arkansas made an Order changing the policy number in its Judgment of November 22, 1948, from 822714 to 882714."

This reference to the Judgment entered by the United States District Court for the District of Arkansas is inaccurate. We quote from the Judgment and Decree of that District Court:

> "That the defendants Lionel A. Jacoby and Betty Jacoby surrender to the plaintiff all their right, title and claim upon the policy of insurance, No. 822714 (later corrected to '882714') issued by the Bankers Life Company of Des Moines, Iowa, and that the cash value of said insurance policy be applied to the payment of the amount herein adjudged to be due the plaintiff;" (Transcript of Record, pp. 26-27.)

The "Absolute Assignment" executed on the 14th day of January, 1949, by a court-appointed agent of Lionel A. Jacoby and Betty Jacoby, assigned to the plaintiff herein all the "right, title and interest in and to contract No. 882714, issued by Bankers Life Company, Des Moines, Iowa," of both Lionel A. Jacoby and Betty Jacoby. (Transcript of Record, p. 31.) Appellant has not at any time challenged the jurisdiction or venue of the United States District Court for the District of Arkansas, before which the insured and the beneficiary made a general appearance.

Based upon the facts, the Trial Court concluuded as follows:

"IV.

"Plaintiff Ruth Jacoby has the power to change the beneficiary of Bankers Life Company's Policy No. 882714 by complying with the provisions of said policy relating to change of beneficiary.

V

"The extended insurance may be surrendered at any time for a cash value equal to the full reserve thereon at the time of surrender less any indebtedness to defendant Bankers Life Company. This cash surrender value may be obtained by plaintiff Ruth Jacoby upon compliance with the terms and conditions of said Policy No. 882714." (Transcript of Record, Conclusions IV and V, pp. 34-35.)

ARGUMENT OF THE CASE.

Appellant stresses its interpretation of the word "surrender" as found in an insurance company contract. (Appellant's Opening Brief, pp. 8-9.)

In the field of insurance the term "surrender" has unquestionably become a word of art. It does not necessarily imply a physical handing over of the policy; the cases uniformly hold that a policy when lost, stolen, or destroyed need not be physically produced. (*Wilcox v. Equitable Life Assur. Soc.,* 173 N.Y. 50, 65 N.E. 857; 124 A.L.R. 1167.)

In re Knight's Estate, 199 P. (2d) 89, defines the word as follows:

> "The term 'cash surrender value' means the cash value, ascertainable by established rules, of a contract of insurance which has been abandoned and given up for cancellation to the insurer by the person having contract right to do so."
>
> *In re Knight's Estate,* 199 P. (2d) 89, 91.

A contract right can of course be abandoned and given up in innumerable ways. A policy clause involved in *Equitable Life Assurance Soc. v. Miller* (1911), 185 F. 98, provided for a cash surrender value payment upon "due surrender of this policy on any anniversary of its register date of issue". Plaintiff, trustee in bankruptcy, standing in the position of the insured, was not held to a physical surrender requirement, the Court pointing out that the company had accepted the policy from the insured after receiving notice of the bankruptcy proceedings and had permitted the insured to make a loan against the policy. It was pointed out that the trustee had acquired all the insured's rights, that the company was not in any way hurt by his inability to deliver the policy physically and that the company is being subjected to double liability merely by its own acts. Consequently, the trustee in bankruptcy was permitted to recover.

In the instant case, Bankers Life Company received notice of the assignment of all rights, titles, and interests of *the insured and the beneficiary* on or about January 25, 1949. (Finding XVIII, Transcript of Record, p. 33.) No claim has been advanced by the insurer that it made any payments to the insured

of the beneficiary prior to said date and no serious contention is made by Bankers Life Company that any person other than Ruth Jacoby asserts any claim to ownership of the policy or may hereafter assert any rights that were not vested in Ruth Jacoby by reason of the court commissioner's assignment.

Of the cases cited by appellant, only one—*Kothe v. Phoenix Mutual Life Ins. Co.,* 269 Mass. 148, 168 N.E. 737—appears closely related to the issue before the Court in the instant case.

In the *Kothe* case, the insured misappropriated funds of plaintiff; the plaintiff secured a civil judgment against the insured, which ordered that unless a certain sum of money is paid, the policy be sold at public auction by a special master. The master assigned the policy to plaintiff who then applied to defendant company for the cash surrender value of the policy. The Court held that the company need not recognize the assignment.

Some of the language used in the Court's opinion seems to lend support to appellant's contention that a physical delivery is required. However, upon examination, this and all other cases examined on this point turn on a very important factor: Could the insurance company be subjected to double liability by recognizing the claim of the assignee?

Thus, in the *Kothe* case, supra, there was a possibility that the insured had made an equitable assignment of his rights before the assignment took place; and the beneficiary was at no time before the Court

and thus had a possible future claim against the insurance company against which it could not be protected.

It must be noted that although the *Kothe* case has been cited in several other cases cited by appellant, it was not therein cited for the proposition that the physical surrender of the policy to the insurer is a condition precedent to the payment by the insurer of the cash surrender value; rather it has been cited for the well-established principle that a garnisheeing creditor has no greater rights against a third party than the debtor would have had.

The case of *Wilcox v. Equitable Life Assur. Soc., supra,* was cited for the proposition that a physical surrender of the policy is unnecessary although made a condition by the policy where the policy was stolen from the party entitled thereto. The Court points out clearly that a court of equity has the power to protect the insurer adequately by ordering the claimant to execute an appropriate release and receipt.

Obviously, in the instant case, the same protection can be afforded Bankers Life Company. An insurance policy, not being negotiable, is merely a memorandum of agreement and without inherent value.

The Judgment and Decree of the United States District Court for the District of Arkansas, dated November 22, 1948 (Transcript of Record, pp. 25-27) divested the defendants of their right, title and claim upon the insurance policy and ordered the defendants to turn over such policy to plaintiff, Ruth Jacoby.

Equity considers done that which the parties have agreed, or the Court has ordered, to be done. Therefore, the assignment executed on January 14, 1949, by the Court-appointed agent, dates back to the Court order.

Beverly v. Blackwood, 102 C. 83, 36 P. 378;
Daggett v. Rankin, 31 C. 321.

> "§ 3529. That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due."
>
> *Civil Code of California,* Section 3529.

At the time of the Court order, the policy belonged to Betty Jacoby (Finding VII, Transcript of Record, pp. 21-22) and she had not transferred it to anyone else; it was in the possession of Lionel Jacoby.

Bankers Life Company has not asserted that it has received any notice of any subsequent assignment, or any assignment other than the one made to Ruth Jacoby by the Court-appointed agent.

In case Lionel Jacoby and Betty Jacoby did later assign and deliver the policy to another, that other could gain no rights thereby. The rules of priority between assignees are stated in 4 *Am. Jur.,* Assignments, § 107 as follows:

> "Effect of Prior Notice to Debtor of Assignment.—On the question of the effect on the priorities between successive assignees of the fact that the subsequent assignee was the first to give notice of the assignment to the debtor, there are

two clearly defined and irreconcilable rules. According to the weight of authority, the assignee who first gives notice of his claim to the debtor is preferred and has the prior right, regardless of whether his assignment was prior or subsequent in time to that under which other assignees claim, unless he takes a later assignment with notice of the previous one or does not give valuable consideration for his assignment. There is, however, a strong line of authority in support of the rule that, as between assignees of a chose in action by assignment from the same person, the one prior in point of time will be protected, although he has given no notice of his assignment to either the subsequent assignee or the debtor. In these jurisdictions mere priority of notice does not give priority of right, as between successive assignees of a chose in action, but the question is determined under the equitable rule that as between equal equities, the first in time is best in right. This, in substance, subject to certain limitations, is the rule adopted by the American Law Institute.

"Even in a jurisdiction holding that priority is determined by the time of the assignment, and not by notice to the debtor, a debtor who pays or becomes bound to pay a later assignee of the debt is not liable to an earlier assignee who failed to give him notice of the assignment. The debtor is not, however, protected in paying a later assignee, where he had notice of a previous assignment before he made payment, although the later assignee was the first to give notice.

"Where priority is determined by order of notice, the view has been taken that the time of the

receipt of a notice, and not the time of its posting, determines the priority between different assignees.

"As the question under discussion is one of general jurisprudence, the Federal courts are not controlled by the decisions of the highest court of the state wherein they sit."

4 *Am. Jur.,* Assignments, § 107;
Restatement of Contracts, § 173.

In California, it is settled that as between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor.

3 *Cal. Jur.,* Assignments, § 35.

Regardless of whether the majority and federal rule applies (first in time is first in right) or whether the California rule applies (first to give notice is first in right), Ruth Jacoby prevails.

Thus under either theory, no subsequent assignee with possession of the policy could be in a legal position to assert a valid claim against Bankers Life Company.

The sole interest of appellant has been fully protected. The Judgment and Decree made by the United States District Court for the District of Arkansas (Transcript of Record, pp. 25-27) fully adjudicated the rights both of Lionel A. Jacoby, the insured, and Betty Jacoby, the beneficiary. Both were before the Court and subject to the Court's jurisdiction. By its decree the only possible claimants to the policy other than Ruth Jacoby have been permanently and finally

foreclosed of any and all possible legal claim to ownership.

In *Sundstrom v. Sundstrom,* 129 P. (2d) 783, 15 Wash. (2d) 103, the mother and widow of the deceased litigated over the proceeds of an insurance policy issued on the life of the deceased. The policy provided for a change of beneficiary by written notice to the company's home office, "accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect." Another provision of the contract provided: "Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office." The insured separated from his wife and gave proper notice to the company that his mother is to be substituted as the beneficiary. Prior thereto, however, he had made an oral, equitable assignment of the policy to his wife. At page 788 the Court stated:

> "It is true that no formal written assignment of the policy was executed, as required by the provision of the policy hereinabove quoted. But that provision, as we have seen, is designed solely for the protection of the insurance company, and its rights are in no way involved here."
>
> *Sundstrom v. Sundstrom,* 129 P. (2d) 783, 788; 15 Wash. (2d) 103.

The same Court said:

> "The proceeds of the policy, as and when payable, became the property of respondent by virtue

> of the equitable assignment, and the insured had no power or right to divest them from her."
>
> *Sundstrom v. Sundstrom*, 129 P. (2d) 783, 788; 15 Wash. (2d) 103.

A Federal Court decree must have as much force and effect in the instant case as an oral, equitable assignment had in the *Sundstrom* case, *supra.* By that decree Lionel Jacoby and Betty Jacoby have been divested of all power to do any act which might in any way prejudice Bankers Life Company. The *Sundstrom* case further indicates that neither physical possession of the policy nor technical observance of every condition of the policy are necessary, *provided the insurer's interest is protected.*

Blackburn v. Merchants Life Ins. Co., 90 Cal. App. 362, 265 P. 882, clearly establishes that here the insurer does not incur any chance of double liability. There the insured handed his life insurance policy to plaintiff, who was then the insured's wife and the beneficiary named in the policy. The policy remained in her possession. Later, after a divorce of the parties, the insured applied for and obtained the cash surrender value of the policy. After the death of insured, plaintiff sought to enforce the policy in her favor. Denying her claim, the Court said:

> "As this right of surrender was not dependent upon the consent of the beneficiary, the respondent was relieved from all liability under the policy when it paid the insured the full surrender value when it was canceled."
>
> *Blackburn v. Merchants Life Ins. Co.*, 90 Cal. App. 362, 365; 265 P. 882.

That case was decided in this jurisdiction.

The issue and deciding factor in *Evans v. Metropolitan Life Ins. Co.,* 33 N.Y.S. (2d) 19, is pointed out in the following extract:

> "The claim of plaintiff's wife for reimbursement of premium paid by her, which may amount to an equitable right, cannot be arbitrarily rejected or divested by defendant through payment of a cash surrender value to plaintiff on his demand. Cash surrender means cash on surrender. The admission by plaintiff that he cannot surrender the policy and receipt book or show loss or destruction, as required by the policy, because they are in possession of his wife in Florida, who refuses surrender, entitled defendant to dismissal of plaintiff's complaint."
>
> *Evans v. Metropolitan Life Ins. Co.,* 33 N.Y.S. (2d) 19.

Plaintiff's proper remedy would have been to join his wife in the action and procure a judgment, if he was entitled to it, declaring him to be the sole owner of his policy. Without such a decree, the insurance company could not safely make payment. Plaintiff did not prevail, not because he did not have the physical possession of the policy, but because he was not its sole owner.

Appellant cites one case which we believe properly states the law applicable to this case. It is *Martin v. New York Life Ins. Co.,* 104 F. (2d) 573, wherein plaintiff was the trustee in bankruptcy seeking the cash surrender value. The insured was a fugitive from justice and had been adjudicated a bankrupt

upon the filing of an involuntary petition. We quote at length:

> "The contractual right of the insurer to receive surrender of the policy as a condition precedent to the paying of cash values of policies is not a mere formal requirement, but affords substantial protection of the insurer's interests. No doubt circumstances in a particular case might be such that the interests of the insurer could not be jeopardized by failure to receive surrender of a policy; *and if the party entitled to the surrender value could not deliver the policy, a court of equity would not permit him to suffer the loss of his property because of inability to perform an act, the non-performance of which could not harm the insurer. If in the instant case the insured were a party to the suit and if a showing could be made that the policies had been destroyed or for other sufficient reasons could not be surrendered, and that the insurer's interest would not be jeopardized by the payment of the cash value of the policies as of the date of bankruptcy, no doubt the plaintiff trustee would be entitled to a judgment for the cash value without surrender of the policies, or, in the alternative, to a decree requiring issuance of new policies to be surrendered in accordance with the terms thereof.* But the facts are that the insured disappeared sometime before the date of bankruptcy and his whereabouts at all times since his disappearance have been and are unknown. The beneficiary also has disappeared and while it is suspected that she has possession of the policies, such fact cannot be established. If the insured died before the date of bankruptcy, his beneficiary is entitled to payment of the amounts of

the policies. If the policies were assigned by the insured prior to bankruptcy for value and are in the possession of the assignee, the insurers are reasonably certain of being subjected to litigation, if not damages.

"It is not sufficient in the instant case that the plaintiff makes a showing that it is impossible to surrender the policies. The general proposition is well recognized that equity will not require performance of an impossible act, but it does not follow that one who is relieved therefrom can claim all the advantages that go with the performance. He may merely escape burdens or penalties. And when, as in the instant case, a party seeks to be relieved from the performance of a condition precedent to obtaining relief on the ground that it is impossible to perform such condition, such party must also show that the granting of the relief will not jeopardize the legitimate interests of the person entitled to performance of the condition.

"Ordinarily in a suit by a creditor of the insured or by the trustee in bankruptcy to recover the cash value of an insurance policy the beneficiary has no vested interest which must be considered. But in the instant case the trial court could not ignore the fact that the beneficiary does have a vested interest in the policy if the insured was not living at the date of bankruptcy. On that date the policies were all in full force and effect. There had been no default in payment of premiums and the insured had not exercised any of his options under the contract relative to receipt of policy values.

"On appeal our inquiry is whether the District Court, as an equity court, in view of the peculiar

> *facts of the case, was justified in finding a want of equity in plaintiff's demand.* In our opinion the District Court properly concluded that the equities of plaintiff did not justify disregarding the contractual interests of the defendant companies and we hold that the District Court did not err in its decree of dismissal for want of equity." (Italics added.)
>
> *Martin v. New York Life Ins. Co.,* 104 F. (2d) 573, at 574-5.

Since the adjudication in bankruptcy was involuntary and the insured absconded prior thereto, the insurer could not be assured that it would not be subjected to double liability. The Court, it may be noted, was not exercised over the trustee's inability to hand over physical possession of the policies; instead the Court's concern centered over its inability to protect the insurer.

In the instant case before the Court, both the insured and the beneficiary had their day in court; the judgment and decree of the United States District Court in Arkansas is final; the insured did not abscond until *after* its rendition, and *after* the Court obtained jurisdiction over his person, and transferred to Ruth Jacoby all of the right, title and interest of both the assured and the named beneficiary and owner of the policy.

Further, the Court in the *Martin* case, *supra,* making all its other pronouncements *dicta,* stated that the peculiar facts involved justified the trial judge in finding a want of equity in plaintiff's demand.

In the instant case, the Honorable Judge Erskine found the equities to favor plaintiff. It is respectfully submitted that no factor suggests any unwise determination of that question.

Finally, a group of cases cited by appellant concerns creditors of the insured who seek the cash surrender value of the insured's policies without bringing the insured before a Court which might enable the chancellor to direct the insured to assign his rights, or, in the alternative, have a Court-appointed master do it for him.

In *Bethards v. Metropolitan Life Ins. Co.,* 287 Ill. App. 7, 4 N.E. (2d) 257, a judgment creditor sought to collect on the debtor's insurance contract both the cash surrender value and the accrued dividends. The Court awarded the dividends, but not the cash surrender value. The creditor had no assignment, and the Court had no power to protect the insurer from double liability.

Several decisions indicate how a creditor may benefit by an unliquidated equity in an insurance policy. One of them is *U. S. v. Mass. Mutual Life Ins. Co.,* 127 F. (2d) 880, wherein the Government, pursuant to Internal Revenue Code, Section 3710, made demand upon the debtor's insurer for the surrender value of his policy. The contract contained the standard condition of "surrender" of the policy. The Court held that the policy was not subject to distraint. Under the contract clause, the insured had to apply for the

cash surrender value. The Court, stating that this condition is perhaps only a formal one which could be passed over in an equitable case, pointed out that the Government failed to state an equitable set of facts, because neither the insured nor the beneficiary was a party to the action, and although the Government could have forced an assignment of the insured's policy rights, it had not done so, and therefore the possible remaining liability of the insurer could not be overlooked.

> "A court of equity having jurisdiction over the person of the insured might in a proper case command the insured to exercise his power and thus transmute the primary obligation of the insurance company into an obligation to pay over the cash surrender value."
>
> *U. S. v. Mass. Mutual Life Ins. Co.,* 127 F. (2d) 880, at 883.

In the instant case, that deficiency was obviated by the act of the District Court for the District of Arkansas making Ruth Jacoby the assignee of all of the rights of both the insured and the beneficiary.

Of similar effect is *U. S. v. Metropolitan Life Ins. Co.,* 41 Fed. Supp. 91, wherein the Court also suggested that the Government bring the insured before the Court for a proper transfer of his rights; when the Government's demand was made, the insured had no claim against the company as he had not requested the cash surrender value.

"No one here has that power nor any power to compel him to act."

U. S. v. Metropolitan Life Ins. Co., 41 Fed. Supp. 91.

CONCLUSION.

Bankers Life Company has no direct interest in this proceeding other than to be protected from double liability. By means of appropriate proceedings which have become final, the insured and the beneficiary have been divested of any and all right, title and interest either of them had in Policy No. 882714 issued by appellant. Their right, title and interest are now vested in appellee, Ruth Jacoby. Appellant has not suggested, and cannot suggest, on what basis any person or persons other than Ruth Jacoby can make a claim against Bankers Life Company on their policy No. 882714, which would not be completely and finally defended by a receipt and release given to it by Ruth Jacoby.

Appellant relies solely on the technicality of appellee's inability to surrender the physical possession of the policy. Yet every time a case cited by appellee involved that point, there the insurer could not be adequately protected by the Court against a possible subsequent claim. Here the insurance company is fully protected.

Should appellee be denied the right to recover the cash surrender value of the policy at issue, since no

one else now has a claim to this policy, the insurer would be able to escape all liability as long as the policy itself remains hidden from the eyes of appellee.

Such a result is unconscionable; the equities are clearly against appellant and the judgment of the District Court should be affirmed.

Dated, Berkeley, California,
April 23, 1951.

Respectfully submitted,
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